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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
ROBERT T. MATSUI FEDERAL COURTHOUSE

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE,

Plaintiff,

v.

JEFFREY MACOMBER, in his official
capacity as Secretary of the California
Department of Corrections and Rehabilitation,

Defendants.

COUNTY OF AMADOR, a public agency of
the State of California,

Plaintiff,

v.

JEFFREY MACOMBER in his official
capacity as Secretary of the California
Department of Corrections and Rehabilitation;
PATRICK COVELLO in his official capacity
of Warden of California Department of
Corrections and Rehabilitation Mule Creek
State Prison; and CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Defendants.

Case No. 2:20-cv-02482-WBS-AC
[Consolidated with 2:21-cv-00038-WBS-
AC]

**PLAINTIFFS' JOINT REQUEST TO
MODIFY FINAL PRETRIAL ORDER,
ECF 110**

Dept: 5
Judge: William B. Shubb
Trial Date: June 6, 2023
Action Filed: January 7, 2021

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REQUEST TO MODIFY PRETRIAL ORDER

Pursuant to paragraph XIV of the Final Pretrial Order, ECF 110, as amended by ECF 116 (“Order”), Plaintiffs California Sportfishing Protection Alliance and County of Amador submit this Joint Request to Modify Final Pretrial Order, ECF 110. This request seeks to modify the Order to add five witnesses to Exhibit A: Plaintiffs’ Witnesses, who may be called in the event Defendants Kathleen Allison and Jeffrey Macomber raise foundational objections to certain self-monitoring reports and discharge notices included in Plaintiffs’ Exhibits in Exhibit C to the Pretrial Order.

DISCUSSION

Permit holders under the Clean Water Act’s National Pollutant Discharge Elimination System program have a duty to monitor their discharges, maintain monitoring records, and submit to the government self-monitoring reports summarizing the results of that monitoring. 40 C.F.R. §§ 122.41(j), (1)(4), 123.25. The Central Valley Regional Water Quality Control Board (“Regional Board”) issued a series of orders requiring Defendants to create and submit discharge notices and self-monitoring reports related to flows through a storm drain system at the Mule Creek State Prison.

Included in Exhibit C to the Order, Plaintiffs have listed certain self-monitoring reports and discharge notices created by Defendants. ECF 110 at 12-21. These notices and reports include statements from Defendants’ representatives that these reports and notices were created and submitted in accordance with the Regional Board’s requirements. The Order provides that the exhibits included in the Order will require no further foundation and will be received in evidence on the motion of any party unless an objection is made not later than four (4) days before the trial date. ECF 110 at pp. 6-7.

Before the pretrial conference in this case, Plaintiffs requested a stipulation from Defendants as to the authenticity of the exhibits currently listed in Exhibit C to the Order, which included the self-monitoring reports and discharge notices at issue here. Declaration of Rebecca Andrews (“Andrews Decl.”) at ¶ 2. Defendants’ pretrial statement represented that “the parties

1 will enter discussions regarding potential stipulations for certain facts and joint trial exhibits.
2 Defendants intend to meet and confer with Plaintiffs to coordinate further.” ECF 106 at ¶ 14.
3 Despite multiple efforts to obtain a response to Plaintiffs’ February 3 request, Defendants have
4 not provided a response indicating whether the self-monitoring reports and discharge notices are
5 authentic, whether they will stipulate to the authenticity of these records, or raise an objection to
6 them. Andrews Decl. at ¶¶ 3-11.

7 Statements that an opposing party “manifested that it adopted or believed to be true” are
8 not hearsay. See Fed.R.Evid. 801(d)(2)(B). Because federal Clean Water Act regulations and
9 multiple Regional Board orders under the Clean Water Act required Defendants to certify their
10 truth and accuracy and to submit them to the Regional Board, the self-monitoring reports and
11 discharge notices are nonhearsay adoptive admissions. Moreover, the only foundation required
12 for Rule 801(d)(2)(B) adoptive admissions is a showing that the admissions were made or
13 adopted by the opposing party or by its agent on a matter within the scope of that agency; there is
14 no personal-knowledge requirement. *See Sea-Land Service, Inc. v. Lozen International, LLC*, 285
15 F.3d 808, 821 (9th Cir.2002) (determining that a party who relies on a third-party document by
16 submitting the document to another—but after reviewing its contents—constitutes an adoptive
17 admission); see also *United States v. STABL, Inc.*, 800 F.3d 476, 484 (8th Cir. 2015) (failing to
18 respond to request for authenticity of self-monitoring reports supported admission of reports as
19 adoptive admission).

20 Plaintiffs believe Defendants have no basis for raising foundational objections to the
21 notices and self-monitoring reports included in Plaintiffs’ exhibit list, especially in light of
22 Defendants’ failure to respond to repeated inquiries the authenticity of these documents for more
23 than 9 weeks while representing to this court their intent to provide such a response. Andrews
24 Decl. at ¶¶ 3-11; ECF 106 at ¶ 14. Nevertheless, to facilitate an efficient response to any potential
25 foundational objection raised to these reports and notices, Defendants request that the Order be
26 modified to include the following witnesses, who certified or signed the documents at issue:

27 Estevan Fregeau
28

Jeanette Poplin, Alpha Analytical Laboratories

Alisabeth J. Wilcox, Alpha Analytical Laboratories

Joshua Cox, Excelchem Laboratories

Rachel Kaua, Alpha Analytical Laboratories

In the event one or more of the individuals are no longer available to authenticate documents at the time of trial, Plaintiffs also seek to call any other representative from these entities who can provide foundational testimony.

CONCLUSION

For the reasons set forth above, Plaintiffs' request modification of the Final Pretrial Order, ECF 110.

Dated: April 12, 2023

BEST BEST & KRIEGER LLP

By: /s/ Rebecca Andrews

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COUNTY OF AMADOR

California Sportfishing Protection Alliance v. Allison, et al.;
Amador v. Macomber, et al.
United States District Court, Eastern District of California,
Case No. 20-cv-02482 WBS AC

PROOF OF SERVICE

I, Lisa Atwood, declare:

I am a citizen of the United States and employed in San Diego County, California.

I am over the age of eighteen years and not a party to the within-entitled action. My business address is 655 West Broadway, 15th Floor, San Diego, California 92101. On April 12, 2023, I served a copy of the within document(s):

PLAINTIFFS' JOINT REQUEST TO MODIFY FINAL PRETRIAL ORDER,
ECF 110;

DECLARATION OF REBECCA ANDREWS IN SUPPORT OF PLAINTIFFS'
JOINT REQUEST TO MODIFY FINAL PRETRIAL ORDER, ECF 110;

[PROPOSED] ORDER



By Electronic Service. Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an e-mail notification of the filing to the parties and counsel of record who are registered with the Court's EC/ECF system.

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I declare under penalty of perjury under the laws of the State of California that the
above is true and correct.

Executed on April 12, 2023, at San Diego, California.



Lisa Atwood